BC EST # D456/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

-by-

David and Nelita Vandt and Adanac Food Importers Ltd.
("Vandt and Adanac")

of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICA TOR:	Paul E. Love
FILE No.:	98/495
DATE OF HEARING:	October 6, 1998
DATE OF DECISION:	October 22, 1998

DECISION

APPEARAN CES

Maria Sousa, David Vandt, Nelly Vandt in person and for Adanac

OVERVIEW

This is an appeal by Mr. & Mrs. Vandt and Adanac (the "employers") of a Director's Determination, dated July 16, 1998, imposing a penalty on the employers for failing to provide to the employee, Ms. Maria Sosa, pay statements for the period November 15, 1995 to September 15, 1997.

ISSUE TO BE DECIDED

Did the Director's delegate decide correctly that Mr. & Mrs. Vandt and Adanac were liable for the penalty?

FACTS

The case for the employers was conducted primarily by Mrs. Vandt. Ms. Maria Sosa was employed by Mr. & Mrs. Vandt as a domestic or nanny for the period November 15, 1995 to December 31, 1996. After this time she was employed by Adanac, which is a food wholesale and distribution company apparently controlled by Mr. Vandt or Mr. and Mrs. Vandt. During the entire time period that she was employed by the employers Ms. Sosa did not receive a statement of her pay. She was terminated by Adanac on September 15, 1997. Ms. Sosa had difficulty obtaining employment insurance benefits because of the failure of the employers to issue pay statements, and because of certain representations made by Mrs. Vandt to the employment insurance officer, which were not consistent with the written documents that related to the termination of Ms. Sosa' s employment.

It is clear from the evidence before me that Mr. and Mrs. Vandt did not keep records of the hours worked during the period that Ms. Sosa was employed as a domestic. There is no evidence that records were kept of hours worked during the time period Ms. Sosa was employed by Adanac. Both Mr. and Mrs. Vandt indicated that records were kept and were in the possession of an accountant.

A demand was made for production of records on February 17, 1998. This demand was received by the employers. No issue was taken on this point before me.

In response to the demand the employers provided records which indicated the amount of the employee's monthly salary, but did not indicate the number of hours worked. The Director's delegate who was investigating Ms. Sosa's complaint wrote to the employers on March 9, 1995. The letter reads in part as follows:

> Thank you for the wage summaries for Ms. Sosa, submitted to us on March 3,1998.
>
> Regrettably there are no daily hours of work as required by Section 28 of the Act, herein appended. Additionally, the employer did not provide any wage statements or copies of same as previously mentioned in my February 17th letter. Section 27 requires that the hours worked by the employee be stated.
>
> As a domestic, Ms. Sosa asserts that she worked 6 days per week and between 82 and 85 hours per week. She claims to have asked you for overtime which was apparently denied. I am asking you to respond to these specific allegations within 15 days of the date of this letter. ...
>
> If the daily and weekly work hours are not produced as required, the employer will be fined $500.00 for contravening each record requirement as stated in section 28 of the regulations herein appended. Failure to respond will result in the same action.
>
> ...Again your input is requested within 15 days or a decision will be rendered in your absence.

The only further information provided after the demand was a handwritten note signed by Ms. Vandt on the letterhead of Adanac Food Importers Ltd. which reads as follows:

> As a live-in domestic, she received room and board and eight hundred dollars per month net. She worked eight hours per day, five days per week.
>
> If you have any questions, please phone my cellular phone 551-8774 or home phone 684-1030.

The employers neglected or refused to respond to the requests and demand of the Director's delegate for payroll information.

The Delegate that issued the penalty was not the delegate who investigated the complaint. The penalty was issued because the information demanded was relevant to the investigation, and no reasonable explanation was given by the employers for failing to comply with the demand. It is noted in the Determination that had an explanation being given the Director would have exercised her discretion not to give a penalty .The Director was also concerned that a penalty was necessary

to deter generally other like minded employers from frustrating investigations of complaints under the Act.

ANALYSIS

In this appeal, the burden rests on the employers to establish an error in the Determination such that I ought to vary or cancel the Determination.

The written submission of the employer filed with the Tribunal, as well as the oral evidence tendered by the employer was not responsive to the issue of whether the Director erred in the exercise of her discretion to impose a penalty .I invited the appellants to address the issue of the penalty in the evidence at the outset of this hearing which was heard at the same time as a hearing in respect of an appeal of a Determination in respect of monies found to be due and owing to Ms. Sosa in Decision # D457/98. The appellants did .not call any evidence with regard to the penalty Issue.

The arguments advanced by the employer on the penalty issue are as follows:

(a) Maria Sosa and none of the earlier nannies asked for a written wage statement.

(b) The employer's relied on their accountant's advice in not supplying a written wage statement and not recording the hours of work.

(c) The accountant has all relevant evidence.

There was no evidence tendered in support of any of these allegations at the hearing of the matter. I do not accept the submission of the employers as credible. Ms. Vandt is a sophisticated business woman, who runs a number of businesses including restaurants and a food importing business. Regardless of whether a employee asks for a wage slip, there is a duty on the employer to provide such a wage slip. This duty is contained in section 27 of the *Act.* In my view s. 27 contains an important employment standard. It is not a requirement that can be waived by an employee pursuant to section 4 of the *Act.* I note in particular that Ms. Sosa, as a person originating in the Phillippines and in Canada for domestic work, was particularly vulnerable to the acts of an employer who failed to comply with the provisions of the *Act.*

If the employers relied on accounting advice in this matter, which again is not proven before me, I do not find that this is a matter which affords a defence. Mrs. Vandt admitted in her submissions that she was aware of the requirements of the *Act* to provide pay statements. Ms Vandt submitted that the accountant had all relevant evidence. I cannot accept this submission as it does not accord with admissions made by Mrs. Vandt at the hearing that she did not make a record of the

employees hours of work. It is not a satisfactory excuse to state that the documents were in the hands of an accountant. Such a statement does not explain a failure to respond to a demand.

It is apparent from the submission of the Director's delegate, which I accept, that the employers had an ample opportunity to participate in the investigation. It is well established that this Tribunal will not permit an employer to sit in the weeds, fail to participate in an investigation and then advance a story at the Tribunal hearing or submissions before the Tribunal: Tri-west Tractor Ltd., BC EST #D 286/96 .

It is clear that the merits of a dispute can only be resolved in a fair and efficient manner when an employer keeps records and such records are available for inspection. In light of my finding in a Determination issued currently with this Determination, I have no hesitation in finding that the failure to maintain records by these employers had the effect of denying to the employee a minimum employment standard. This is a proper case for the imposition of a penalty , and I am not satisfied that the employer has established any error in the Determination.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, be confirmed.

Paul E. Love, Adjudicator
Employment Standards Tribunal